OCT 10 1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 392

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WALTER E. MEYER,
Petitioner, Pro Se,
31 Nassau Street,
New York 5, N. Y.

SONNENSCHEIN, BERKSON, LAUTMANN,
LEVINSON & MORSE,
Attorneys for Petitioner.
77 West Washington Street,
Chicago 2, Illinois.

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Respondents fail to meet petitioner's argument as to the law.

They refer to an order of the St. Louis Southwestern reorganization court which forms no part of the record and which in no way affects the question submitted to this Court.

They contend, without justification, that the claim filed herein is without merit.

I.

As to respondents' discussion of the law:

Respondents in their Point I do not answer the point made by petitioner that in the ordinary bankruptcy or

equity receivership proceeding, if the trustee or receiver fails to take over or to enjoin the prosecution of a suit brought previous to bankruptcy or receivership, it may not be pleaded as a defense that the appointment of the trustee or receiver vested such title in him as to abate the suit.

They also fail to answer petitioner's point that there is nothing in Section 77 of the Bankruptcy Act which serves to differentiate the law in reorganization proceedings from the law in ordinary bankruptcy or equity receivership proceedings so as to preclude the continued prosecution of a suit begun or a claim filed previous to reorganization proceedings (Main Brief, p. 11, *et seq.*).

Respondents contend under their Point II that the decision of the Circuit Court of Appeals herein is not in conflict with applicable decisions of this Court.

They fail to discuss the cases cited by petitioner in his brief (pp. 13-17), including *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734; *Ex Parte Baldwin*, 291 U. S. [illegible]; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, and *Warren* v. *Palmer*, 310 U. S. 132, which show that in the opinion of this Court bankruptcy courts have always had exclusive jurisdiction of the bankrupt estate.

Respondents confine their discussion under this head to *Thatcher* v. *Rockwell*, 105 U. S. 467, and *Johnson* v. [illegible], 222 U. S. 538. These cases were cited by petitioner in support of the proposition that the appointment of the trustee in the ordinary liquidating bankruptcy does not abate a pending suit (Main Brief, p. 12).

If, however, it is true, as petitioner contends, that subsection (a) of Section 77 does not serve to differentiate the law in reorganization proceedings from the law in bankruptcy and receivership proceedings in such a way as to preclude the continued prosecution of the claim, then it may be claimed with reason that the decision of the

Circuit Court of Appeals is in conflict also with these decisions of this Court.

Respondents endeavor to distinguish *Thatcher* v. *Rockwell* on the ground that it was alleged in that case that the assignee in bankruptcy had no interest whatever in the suit because the claim had been transferred by the bankrupt to a third person more than four months previous to bankruptcy. In quoting from the decision of the Court (Respts' Brief, pp. 10-11), they fail to include the language that follows (pp. 469-470):

> The further charge of the court to the effect that if the assignee expressly consented that the bankrupt might continue to prosecute the suit in his own name, the defendants could not avail themselves of the bankruptcy as a defence, was also right. * * * The true rule is stated in *Foster* v. *Gaff*, 91 U. S. 521; *Burbank* v. *Bigelow*, 92 id. 179; *Norton* v. *Switzer*, 93 id. 355; *Jerome* v. *M'Carter*, 94 id. 734; *M'Henry* v. *La Société Française, &c.*, 95 id. 38; and *Dauchy* v. *Freedlander*, 104 id. 570. These cases, although the bankrupt happened to be a defendant, establish the doctrine that under the late bankrupt law the validity of a pending suit, or of the decree or judgment therein, was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not, he was equally bound with any other party acquiring an interest *pendente lite*. *It is no defence to the debt that the creditor has become a bankrupt; and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered. This is a sufficient protection for the debtor.*[*]

Johnson v. *Collier*, 222 U. S. 538, has not the limited applicability claimed by the Circuit Court of Appeals (R. 63) and by the respondents (p. 11 of their brief). In that case the bankrupt brought suit after filing a voluntary

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[*] Italics petitioner's.

petition, but before the appointment of the trustee. The Court held that a suit begun *after* bankruptcy but before the appointment of a trustee may be continued after such appointment, in the absence of any action on the part of the trustee to enjoin the continued prosecution of the suit. Thus the *Collier* case is a reaffirmation and extension of the rule laid down in *Thatcher* v. *Rockwell*. After citing that case, Justice Lamar said (p. 540):

> "If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some states the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice."

At page 7 of their brief respondents state they are unable to perceive how subsection (*l*) of Section 77 affects the provisions of subsection (a) as contended.

The opinion of Judge Sanborn in *Thompson* v. *Terminal Shares*, 104 F. (2d) 1, at pp. 4-5, states that these provisions are to be read together (Main Brief, p. 17). See also *In re Prudence Bonds Corp.*, 75 F. (2d) 262; *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. (2d) 363; and *In re Standard Gas & Electric Co.*, 119 F. (2d) 658, where there was a similar construction of similar provisions of Section 77B.

Respondents refer (p. 7) to Section 57 (m) of the Bankruptcy Act (11 U. S. C. A. 93(m)), which states:

> "The claim of any estate which is being administered in bankruptcy against any like estate may be proved and filed by the receiver or trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors."

and contend that the privilege conferred upon the trustee or receiver is so exclusive as to abate a claim, as in the instant case, filed previous to reorganization proceedings of the company for whose benefit the claim was filed.

A trustee in bankruptcy or a receiver always has had the power to file a claim in another bankruptcy or receivership proceeding. But even if the language of the statute made it mandatory upon the receiver or trustee "to prove and file the claim", this, in view of the decisions of the courts cited in his main brief, would in no way affect petitioner's right to continue to prosecute a claim filed previous to reorganization proceedings.

Respondents cite subsection (c)(9) of Section 77 which requires the court to direct the trustee to report any facts pertaining to irregularities, fraud, misconduct or mismanagement as a consequence of which the debtor may have a cause of action.

This subsection, in addition to subsection (a) was relied upon by the Special Master in support of his findings and conclusions (R. 42). Neither the District Court nor the Circuit Court of Appeals, however, thought it worth while to refer to subsection (c)(9). A trustee or receiver would be under the duty imposed by this subsection even without this express provision. Moreover, the fact that the court is expressly so charged does not in itself carry the assurance of a thorough and impartial investigation if the trustee has not the capacity or the will to do so.

Under Point III respondents purport to answer petitioner's contentions:

(a) That the decision of the Circuit Court of Appeals herein is clearly in conflict with decisions of the Circuit Court of Appeals for the Second Circuit, and

(b) That the decision is probably in conflict with decisions of the Circuit Courts of Appeals for the Eighth, Ninth and Third Circuits.

As to (a):

Petitioner cited three cases under this head (Main Brief, pp. 19-21). *In re Prudence Co.*, 96 F. (2d) 157, clearly in point, is not discussed by respondents. *In re Prudence Bonds Corporation*, 75 F. (2d) 262, was cited by petitioner for the dictum quoted. The two *Prudence* cases should be read together.

Respondents fail to bring out that in the earlier case, the stay was granted by the *reorganization court* on the ground that the suit would interfere with the disposition of the debtor's estate. The language quoted by the respondents from the opinion in that case would indicate that, in the view of Judge Hand, the bankruptcy court previous to the enactment of Section 77B had the jurisdiction which was expressly conferred by subsection (a) of that statute. Admitting that the trustee of St. Louis Southwestern may apply to stay the prosecution of the claim herein, the fact is that he has not done so.

Petitioner, in addition, cited *Meyer* v. *Kansas City Southern*, 84 F. (2d) 411, decided by the same court, which is also not discussed by respondents.

As to (b):

Respondents in their brief (pp. 11, 13) wrongly interpret two of the three cases cited by petitioner in support of his position, viz., *Thompson* v. *Terminal Shares*, 104 F. (2d) 1, and *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. (2d) 363. They omit any mention of the third case, *In re Standard Gas & Electric Co.*, 119 F. (2d) 658.

Judge Sanborn in *Thompson* v. *Terminal Shares* held that the jurisdiction conferred by Section 77 was to be considered the "traditional jurisdiction" of the bankruptcy court.

In *United States* v. *Tacoma Oriental S. S. Co.*, it was held that "exclusive jurisdiction" under Section 77B was given to the court "only if such person is in some manner invading, interfering, or disposing of the debtor's res, and then only to the extent of preventing or forestalling the invasion, interference or disposition of such res. The act gives no jurisdiction to the trial court to issue its process outside its district in proceedings purely in personam, in which no protection of the debtor's res is involved."

In *In re Standard Gas & Electric Co.*, 119 F. (2d) 658, at page 661, the Court said:

> "The grant of exclusive jurisdiction over the debtor and its property was not a departure from established bankruptcy practice. The Bankruptcy Act, 11 U. S. C. A. § 1, et seq., from the time of its enactment had conferred upon courts of bankruptcy exclusive jurisdiction over bankrupts and their property. Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645; Lazarus, etc. v. Prentice, 234 U. S. 263, 34 S. Ct. 851, 58 L. Ed. 1305; Forcey v. Silberblatt, 3 Cir., 78 F. 2d 1016. * * * In section 77B Congress likewise did not by any express language confer broad jurisdiction over claims by a debtor or its trustee against third persons. We think that such jurisdiction is not to be implied from the grant of jurisdiction over the debtor's property, but that the latter jurisdiction is essentially similar in nature to that possessed by courts of bankruptcy over the property of bankrupts."

The decision of the Circuit Court of Appeals herein is in conflict with the above decisions.

Respondents discuss at pages 12 to 14 of their brief a number of decisions in ordinary liquidating bankruptcy

and receivership cases cited by petitioner. These decisions, not being in reorganization cases, were not cited in support of petitioner's position that the decision herein was in conflict with the decisions of other Circuit Courts of Appeals. Nevertheless, if Section 77, as shown by petitioner, conferred no such jurisdiction on the reorganization court as would preclude the prosecution of the claim by petitioner, the decision herein may be said to be in conflict with said decisions.

A discussion of the cases referred to by respondents follows:

In *Paradise* v. *Vogtlandische Maschinen-Fabrik*, 99 F. (2d) 53, after a suit had been brought, the plaintiff was adjudicated a bankrupt and a trustee was appointed. The plaintiff continued the prosecution of the suit. The Court held (p. 55):

> "It is settled that a pending action will not abate merely because of the bankruptcy of the plaintiff. Thatcher v. Rockwell, 105 U. S. 467, 26 L. Ed. 949; Hahlo v. Cole, 112 App. Div. 636, 98 N. Y. S. 1049; Griffin v. Mutual Life Ins. Co., 119 Ga. 664, 46 S. E. 870. * * * If the trustees decline or fail to prosecute the action the bankrupt may continue its prosecution to judgment. Bluegrass Canning Co. v. Steward, 6 Cir., 175 F. 537; Griffin v. Mutual Life Ins. Co., supra; Hahlo v. Cole, supra; Bennett v. Associated Theaters Corp., 247 Mich. 493, 226 N. W. 239."

In *Bluegrass Canning Co.* v. *Steward*, 175 Fed. 537, suit was begun by a corporation previous to bankruptcy. The Court said (pp. 543-544):

> "Pending the suit below the canning company was adjudicated a bankrupt, and this fact was shown in the case. The creditors declined to prosecute the suit. The court below allowed the suit to go on in the name of the bankrupt upon the execution of a bond indemnifying the bankrupt against costs by J. E. Gunther, a surety upon the attachment bond, * * *

and the motion to dismiss the suit because of the plaintiff's bankruptcy was denied. * * * The bankruptcy of the corporation did not dissolve it. 2 Clark & Marshall, Private Corporations, p. 863. While the bankrupt trustee may intervene and prosecute a pending suit if he will, yet, if he does not, we see no reason why the bankrupt may not go on with it if he wishes. Loveland on Bankruptcy (3d Ed.) p. 428."

Missouri, K. & T. Trust Co. v. *German Nat. Bank*, 77 Fed. 117, was a suit by a bank which subsequently became insolvent. A motion was made by the defendant to have the receiver of the bank substituted as plaintiff. The Court said (pp. 122-123):

"This motion was denied, and an exception was taken by counsel for the trust company. * * * the denial of the motion is no ground for a reversal of the judgment which was subsequently rendered. The denial of the motion did not prejudice the rights of the trust company in any respect, and if the receiver desires to be substituted as a party plaintiff, so as to be in a position to control the judgment, on making a proper application to the circuit court he can still be made a party for the purpose above indicated."

In *Boston Elevated Ry. Co.* v. *Paul Boyton Co.*, 211 Fed. 812, the defendant pleaded that after the suit had been begun a receiver was appointed for the plaintiff and that the plaintiff was without right to continue to prosecute the suit without leave of court. The Court held (p. 823):

"The suit did not abate by the appointment of a receiver for the plaintiff's rights of action while it was pending. The receiver had not asked to intervene, nor had the defendant moved to have him substituted as plaintiff. The question of his right to maintain the action, as receiver, in the jurisdiction of a court other than that of his appointment did not arise."

In *Hartford Accident & Indemnity Co. v. Federal Bond & Mtge. Co.*, 59 F. (2d) 950, defendant moved to abate the action in case the receiver did not intervene. The motion was denied.

The opinions in the cases cited by petitioner in support of the rule, and not discussed by respondents, are at least as equally convincing.

II

As to the order of the St. Louis Southwestern reorganization court referred to by respondents:

At page 8 of their brief respondents refer to an order of Judge Moore of the St. Louis Southwestern reorganization court, denying an application for an order to show cause why an order should not be made and entered permitting petitioner to prosecute the claim filed by him in behalf of St. Louis Southwestern against the Rock Island. The order forms no part of the printed record. Respondents state that a copy of the order, under certificate, has been filed by them with the Supreme Court. They also state that the application for the order to show cause "was filed after the entry on February 7, 1944 of the order of the District Court in the Rock Island proceedings disallowing the claim," and that after the appeal was perfected they "filed their motion in the Circuit Court of Appeals asking leave to supplement the record by making Judge Moore's order a part thereof; the Circuit Court of Appeals did not pass on this motion."

Respondents add:

> "Nowhere in his petition or brief does he [petitioner] mention Judge Moore's order denying him permission to prosecute his claim."

Respondents on February 8, 1945, made motions to dismiss the appeal and for leave to supplement the record.

On February 15, 1945, an order was entered denying the motion to dismiss, with leave to renew.

The respondents in their brief of April 5, 1945, submitted to the Circuit Court of Appeals, renewed their motions, but there was no further order by the Court thereon.

Respondents could have had the papers on these motions, together with said order of Judge Moore annexed thereto, included in the record on the petition. They failed to have this done.

Petitioner does not regard these moving papers as important or relevant to the question presented to this Court. Inasmuch, however, as respondents have referred to these moving papers and apparently attach great importance to the said order, petitioner reproduces in the appendix to this brief: (1) Respondents' motion herein to dismiss the appeal and motion for leave to supplement the record, (2) the order denying the motion to dismiss the appeal with leave to renew; (3) petitioner's answer to said motions. A certified copy of these papers is being filed with this Court.

Judge Kerner of the Circuit Court of Appeals in his opinion herein made no mention of the order of Judge Moore, though this order had previously been called to the attention of the Court by respondents' motion to have it made part of the record on the appeal. Because of this and because the order formed no part of the record, petitioner did not refer to it in his petition or brief.

The order in question, as shown on its face, is an order denying an application for an order to show cause. The purpose of an order to show cause, it is unnecessary to state, is to shorten the time in which a motion under the rules must be made returnable. A denial of an application for such an order is not a denial of the motion which it is sought to bring on in this way.

As appears from said answer, petitioner in New York was informed over the telephone by his local counsel in St. Louis that upon the argument of the order to show cause the point was raised by the trustee of St. Louis Southwestern that the petitioner had unduly delayed making his application. This apparently was the reason for the denial of the application for the order to show cause.

But even assuming that there had been a motion duly noticed and a decision had been rendered on the merits (which was not the case), such a denial would not have constituted a stay and would not affect the question presented to this Court.

The fact that the claim against Rock Island has been formally called to the attention of the St. Louis Southwestern trustee by the application for the order to show cause would indicate this at least, however,—that the trustee had given consideration to the cause of action set forth in the claim and had deliberately chosen neither to take over the claim, nor, on the other hand, to take steps to restrain its continued prosecution by petitioner.

III

As to the substantial and meritorious nature of the claim:

Under Point IV respondents state (p. 18) that the claim filed by petitioner in behalf of St. Louis Southwestern "has no possible asset value to" St. Louis Southwestern, and that "respondents should not be put to the time, trouble and expense of a hearing involving a subject which has already been so thoroughly threshed out."

Petitioner did not "inject" into the discussion the merits of the claim. The matter is referred to by the Circuit Court of Appeals (R. 62), and at great length by the Special Master (R. 34-36, 46-47) although it was not

intended that he go into the merits of the claim in deciding the question submitted to him (R. 34).

The report of the Interstate Commerce Commission in the St. Louis Southwestern reorganization proceedings shows that petitioner charged breaches of fiduciary and contractual obligations and violations of the antitrust laws in connection with the control exercised over St. Louis Southwestern by Rock Island, Kansas City Southern, and Southern Pacific Company, and that as a result the earnings of St. Louis Southwestern were impaired and its assets wasted. The Commission found that petitioner's charges were not sustained. (See *St. Louis Southwestern Ry. Co. Reorganization*, 249 I. C. C. 5, at pp. 46-149; 252 I. C. C. 325, at pp. 330-338.) As Chairman Eastman stated in his dissenting opinion, however, the Commission made no investigation (p. 186; R. 26).

In the decision of the United States District Court affirming the report of the Interstate Commerce Commission, *In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914, referred to by the respondents (p. 16), the Court held, at page 927, that "the validity of Meyer's charges of bad faith" was a matter "requiring study by experts on railroad affairs, involving, as they do, expert analysis of traffic movements, freight loadings, financial statements, and other data peculiarly within the comprehension of the I. C. C. We are of the opinion that the Commission has had full opportunity to pass on these matters and exercise informed judgment. We are, therefore, not disposed to refer the plan back to the Commission on this account and, accordingly, overrule Meyer's objections to the plan of reorganization."

Petitioner asserts in his appeal from the decision of said District Court that the report of the Commission is of a highly arbitrary nature and is contrary to the proof in the record, and that Judge Moore of the St. Louis Southwestern reorganization court gravely erred in failing to

evaluate either the proof placed in the record before the Commission or the large amount of additional proof placed in the record in the hearings before Judge Davis.* Indeed the important proof placed in the record in the hearings before Judge Davis has thus not been considered either by the Interstate Commerce Commission or by the District Court.

The respondents in their brief (pp. 17-18) quote certain paragraphs from Chairman Eastman's dissenting opinion (R. 26), in which Mr. Eastman refers to the conjuring up by petitioner of "conspiracies which go beyond the reasonable probabilities of the situation." They state that in view of this language, it is misleading for petitioner to state that Chairman Eastman dissented upon the matters now under consideration.

That remark of Chairman Eastman does not refer to the matters so vividly set forth by him in his dissenting opinion, which indicate that he believed that Rock Island had played a leading role in the downfall of St. Louis Southwestern (R. 17, *et seq.*).

Chairman Eastman, it is clear from his opinion, read together with the majority report of the Commission (249 I. C. C. 5, at p. 49), was alluding to the petitioner's charge that Union Pacific continued in control of Southern Pacific long after the decree of the Supreme Court in *United States* v. *Union Pacific*, 226 U. S. 61, dissolving the illegal combination by which Union Pacific controlled Southern Pacific, and that acting under the influence of interests close to Union Pacific, Southern Pacific instigated the filing of the petition for reorganization of St. Louis Southwestern.

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* Extended hearings were held before Judge Davis in October and November 1942. Before any decision was rendered, Judge Davis passed away, and Judge Moore succeeded him in the case.

It was not alleged by petitioner in the claim herein that Rock Island was in league with Union Pacific. Therefore, whether petitioner was justified in the charge in question is quite beside the issue involved in this case.

As to the reference to *diversions of traffic* in respondents' quotation from the dissenting opinion, Chairman Eastman admitted that he "has not been able to study it with the greatest of care."

The suit instituted by the Government on August 23, 1944, against forty-seven Class I railroads owning lines west of the Mississippi, two important banking houses and others, charged a conspiracy of a far-reaching nature, as appears from the Government's complaint in that suit together with the "Western Agreement," annexed as an exhibit. Union Pacific, Southern Pacific, Kansas City Southern, Missouri-Kansas-Texas, the trustees of Rock Island and the St. Louis Southwestern trustee are joined as defendants. The violations of the Sherman Antitrust Act charged are alleged to have continued at least up to the time of the filing of the complaint. These violations include not only a conspiracy to keep up rates, but also nineteen other offenses. The Rock Island and the St. Louis Southwestern and their respective trustees, petitioner avers, were involved in these violations. The failure of Southern Pacific to carry out its contractual obligations to St. Louis Southwestern and to take various other steps in the development of St. Louis Southwestern, petitioner is convinced, resulted in part from the illegal combination charged.

The Government's suit is referred to in petitioner's answer to respondents' motions to dismiss the appeal and to supplement the record, reproduced in the appendix hereto.

Petitioner regarded the facts revealed by the Government's suit as constituting newly discovered evidence of the utmost importance and relevancy to his charges of conspiracy by which St. Louis Southwestern was con-

trolled, its assets wasted and its earnings impaired. He therefore moved before the Circuit Court of Appeals for the Eighth Circuit in December, 1944, that the St. Louis Southwestern proceedings be remanded to the District Court with instructions to remand to the Interstate Commerce Commission in order that the Commission might decide whether to institute an investigation into the facts alleged by the Government in its said suit.

On the argument, the Court ruled that the motion be set aside without prejudice and be heard in connection with the hearing upon the merits of the appeals. The appeals together with said motion were argued on April 6 and 7, 1945, and are now being considered by the said Circuit Court of Appeals.

CONCLUSION

For the reasons urged therein, the petition for a writ of certiorari should be granted.

Dated: New York, October 5, 1945.

Respectfully submitted,

WALTER E. MEYER,
Petitioner *Pro Se.*

SONNENSCHEIN, BERKSON, LAUTMANN,
LEVINSON & MORSE,
Attorneys for Petitioner.

Appendix

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 8585

IN THE MATTER OF

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor,

WALTER E. MEYER,

Appellant,

v.

JOSEPH B. FLEMING and AARON COLNON, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company,

Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable MICHAEL L. IGOE, Judge.

MOTION TO DISMISS APPEAL. MOTION FOR LEAVE TO SUPPLEMENT RECORD.

Joseph B. Fleming and Aaron Colnon, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, appellees herein, move:

1. That this appeal be dismissed on the ground that the appellant Walter E. Meyer, claimant below, has no right to prosecute the cause of action set forth in his claim;

2. That they be granted leave to supplement the record herein by filing in this court a certified copy of an order of the United States District Court for the Eastern District of Missouri, entered February 28, 1944, in the reorganization proceedings of St. Louis Southwestern Railway Company, No. 8497, denying said Walter E. Meyer's application for permission to prosecute, on behalf of St. Louis Southwestern Railway Company, the claim theretofore filed by him in the court below.

Respectfully submitted,

JOSEPH B. FLEMING,
AARON COLNON,
Trustees, Appellees,
By OTIS F. GLENN,
W. F. PETER,
MARCUS L. BELL,
Attorneys for Appellees.

Appendix.

STATEMENT.

This is an appeal from an order disallowing a claim filed by appellant in the reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company.

In accordance with the prescribed procedure appellant filed with the Special Master in the proceedings below a "proof of claim" of St. Louis Southwestern Railway Company and of himself and other minority stockholders of said company against The Chicago, Rock Island and Pacific Railway Company, claiming $31,593,874 damage to the St. Louis Southwestern Railway Company, a Missouri corporation, as a result of a conspiracy, set out in the proof of claim (R. 2), between The Chicago, Rock Island and Pacific Railway Company, principal debtor in the proceedings below, and certain other parties, to injure and damage the St. Louis Southwestern to their own advantage. It is apparent from the face of the claim that it is a derivative stockholders' claim.

The claim was filed April 26, 1934.

On December 12, 1935, St. Louis Southwestern Railway Company filed in the District Court of the United States for the Eastern District of Missouri a petition for reorganization under Section 77 of the Bankruptcy Act (R. 8). On January 3, 1936, the court held that the petition was properly filed, and on January 4, 1936, appointed Berryman Henwood, Esq., trustee under Section 77.

The Trustees herein had already filed objections to the claim (R. 7), but promptly upon the appointment of a trustee for the St. Louis Southwestern Railway Company filed with the Special Master a statement of that fact, alleging that the effect of the bankruptcy proceedings of

the St. Louis Southwestern was to vest in the Trustee all causes of action vested in or belonging to the St. Louis Southwestern Railway Company, and that by reason thereof the claimant Meyer, appellant here, could no longer maintain or assert his claim in this proceeding (R. 8).

On February 2, 1942, Jacob I. Grossman, Special Master, filed with the Clerk's office his Master's report on said claim (R. 34). He held (R. 36):

> "In my opinion Meyer should not be allowed to prosecute this claim:
>
> "(1) The prosecution of claims on behalf of St. Louis Southwestern Railway Company or its trustee is in the exclusive jurisdiction and authority of the United States District Court for the Eastern District of Missouri, in which there is pending the St. Louis Southwestern reorganization case under Section 77 of the Bankruptcy Act. That court has not authorized Meyer to prosecute the claim, nor has that court or its trustee adopted the claim.
>
> "(2) The reason for the prosecution by a stockholder of a claim belonging to a corporation ceases when a trustee for the corporation is appointed in reorganization proceedings under Section 77 of the Bankruptcy Act.
>
> "(3) Neither the corporation nor its trustee in the reorganization proceedings has been brought into the jurisdiction of this court by summons."

This report was accompanied by a supplemental report which considered certain suggestions made by Meyer as to the form of the first report mentioned, which had been submitted to Meyer for his comment.

On February 7, 1944, the court below approved the Master's report, and entered an order disallowing the

claim. The Court made the following finding (R. 51):

> "THE COURT FURTHER FINDS that on the 12th day of December, 1935, the St. Louis Southwestern Railway Company filed its petition for reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the Eastern District of Missouri. Subsection (a) of Section 77 (11 U. S. C. A. Sec. 205 (a)) provides in part as follows:
>
> "'If the petition is so approved, the Court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose.'"

After quoting from subsection (c) (2) of Section 77, the Court further said (R. 52):

> "Under the foregoing provisions of the Bankruptcy Act, upon approval of a petition for reorganization and the appointment of a trustee or trustees, all rights of action on behalf of the debtor are vested in the trustee or trustees, subject to the control of the Bankruptcy Court. While a debtor's property is being administered upon in a Bankruptcy Court, it would be inconsistent to have rights of action in favor of the debtor enforcible by its stockholders at their own will and discretion. If a trustee should refuse or fail to act, the stockholders may request the Court to issue appropriate instructions to the trustee. The record here does not show that claimant ever requested such action or obtained permission from the District Court for the Eastern District of Missouri to prosecute this claim."

The law is clear: there is no possibility of a different construction. The prosecution of this claim is entirely in the hands of the St. Louis Southwestern Trustee, under the instructions of the court which appointed him. That Trustee is a stranger to these proceedings; since his appointment, appellant Meyer is a stranger to this claim. This appeal therefore should be dismissed.

While it has no legal bearing on the order of the Court below from which this appeal is pending, it is proper in order to acquaint this Court with all the facts in the matter, that the appellees ask leave, which they hereby do, to submit to this Court a certified copy of an order of the United States District Court for the Eastern District of Missouri, entered February 28, 1944 (after the entry of Judge Igoe's order below), in the reorganization proceedings of St. Louis Southwestern Railway Company therein pending (In the Matter of St. Louis Southwestern Railway Company, Debtor, No. 8497, U. S. Dis. Ct. E. D. Missouri, Order No. 779, Printed Proceedings page 8997). A certified copy of said order is attached to this motion. From this order it appears that the court in the St. Louis Southwestern proceedings has refused to permit Meyer, appellant, to prosecute the claim.

Respectfully submitted,

OTIS F. GLENN,
W. F. PETER,
MARCUS L. BELL,
Attorneys for Joseph B. Fleming and Aaron Colnon, Trustees, Appellees.

Chicago, Illinois,
February 8, 1945.

Appendix.

IN THE

DISTRICT COURT OF THE UNITED STATES

EASTERN DIVISION,

EASTERN JUDICIAL DISTRICT OF MISSOURI.

IN THE MATTER OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor.	No. 8497.

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD.

ORDER

DENYING ORAL MOTION OF WALTER E. MEYER FOR AN ORDER ON BERRYMAN HENWOOD, TRUSTEE, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR, TO SHOW CAUSE WHY AN ORDER SHOULD NOT BE MADE PERMITTING WALTER E. MEYER TO PROSECUTE A CLAIM FILED BY HIM IN BEHALF OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AGAINST THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DSTRICT OF ILLINOIS, EASTERN DIVISION, IN THE PROCEEDINGS ENTITLED "IN THE MATTER OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, DEBTOR; IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD, NO. 53209."

Oral motion of Walter E. Meyer for an order on Berryman Henwood, Trustee of the property of the Debtor St. Louis Southwestern Railway Company, to show cause why an order should not be made and en-

tered permitting said Walter E. Meyer to prosecute the claim filed by him in behalf of St. Louis Southwestern Railway Company on or about April 24, 1934, against the Chicago, Rock Island and Pacific Railway Company, in the District Court of the United States for the Northern District of Illinois, Eastern Division, in the proceedings entitled "In the Matter of The Chicago, Rock Island and Pacific Railway Company, Debtor; In Proceedings for the Reorganization of a Railroad, No. 53209", being presented to the Court with affidavits in support thereof, and the Court having heard counsel on the said motion, and being fully advised in the premises,

It Is Ordered:

That the said motion of Walter E. Meyer be and the same is hereby denied by the Court.

(signed) GEO. H. MOORE,
District Judge.

Dated February 28, 1944.

(Certification by Clerk)

Appendix.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 8585

February 15, 1945

IN THE MATTER OF CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., Debtor, WALTER C. MEYER, Appellant, *v.* JOSEPH B. FLEMING & AARON COLNON, as Trustees, etc., Appellees.	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Before Honorable WILLIAM M. SPARKS, Circuit Judge.

It is ordered that the motion of appellees to dismiss this appeal be denied, without prejudice to the right to renew said motion at the hearing.

It is further ordered that appellant's brief herein be filed on or before March 16, 1945.

Appendix.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 8585

IN THE MATTER OF
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Debtor.

WALTER E. MEYER,
Appellant,
v.
JOSEPH B. FLEMING and AARON COLNON, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable MICHAEL L. IGOE, Judge.

ANSWER OF APPELLANT TO MOTIONS OF APPELLEES TO DISMISS APPEAL AND FOR LEAVE TO SUPPLEMENT RECORD

The Trustees, appellees herein, made motions dated February 8, 1945, to dismiss the appeal herein and for leave to supplement the record. After hearing, this Court denied the motion to dismiss without prejudice to renew at the hearing upon the appeal. The appellees in the concluding paragraph (p. 12) of their brief, dated April 5, 1945, state that they are renewing the said motions.

At pages 3 to 5 of the said motion papers there is a discussion of matters bearing on the contested issues of this appeal. These matters are covered in appellant's brief and reply brief submitted to this Court.

Appellees annexed to their motion papers a copy of an order of the St. Louis Southwestern reorganization court, dated February 28, 1944, from which it appears that that court denied an application for an order to show cause why an order should not be made permitting this appellant to prosecute the claim filed by him herein in behalf of St. Louis Southwestern.

Appellees admit (p. 6) that the order "has no legal bearing on the order of the Court below from which this appeal is pending." They state, however: "From this order it appears that the court in the St. Louis Southwestern proceedings has refused to permit Meyer, appellant, to prosecute the claim."

As appears from the order itself, this is not in accordance with the facts.

This appellant was not present upon the argument of the said application. He did, however, draw the affidavit upon which the application was based.

It was stated in said affidavit that some nineteen days previous thereto, the United States District Court for the Northern District of Illinois, Eastern Division (through Judge Igoe), had rendered its decision holding that appellant had no right to prosecute the cause of action set forth in the claim filed herein.

Appellant in said affidavit referred to the following language in the order of Judge Igoe, and also annexed a copy of said order:

> "While a debtor's property is being administered upon in a Bankruptcy Court, it would be inconsistent

to have rights of action in favor of the debtor enforcible by its stockholders at their own will and discretion. If a trustee should refuse or fail to act, the stockholders may request the Court to issue appropriate instructions to the trustee. The record here does not show that claimant ever requested such action or obtained permission from the District Court for the Eastern District of Missouri to prosecute this claim" (Tr. 52).

The special reasons for asking for an order to show cause were stated by appellant to be as follows:

"My time to appeal and to file an application for a rehearing upon the decision and order of Judge Igoe expires on March 7, 1944. Unless this application is granted in time for me to present the above authorization to the United States District Court of Illinois and to take appropriate steps for a rehearing upon Judge Igoe's order, I will be precluded from obtaining the relief which I intend to seek in said United States District Court of Illinois.

"For this reason I make this application by order to show cause rather than by ordinary notice of motion."

It does not appear why the application for the order to show cause was denied. As appears from an entry in appellant's diary contemporaneously made, however, appellant was informed over the telephone by his local counsel that the point was raised by the trustee of St. Louis Southwestern that this appellant had unduly delayed making the application.

The only definite fact revealed by the order, copy of which is annexed to appellees' motions, is that the trustee of St. Louis Southwestern has knowledge of the existence of the claim and that having that knowledge, he has chosen not to take any steps to enjoin its continued prosecution. The fact that a trustee in bankruptcy has knowledge of

the existence of a cause of action which is being asserted by a bankrupt and takes no steps to restrain its continued prosecution, is a consideration of weight in determining whether a court will permit the continued prosecution of a suit. See the language quoted from *Paradise* v. *Vogtlandische Maschinen-Fabrik*, 99 F. (2d) 53, 55, in appellant's reply brief (p. 5).

The effect of the denial on February 28, 1944, of the application for the order to show cause was to prevent appellant from using such an order upon a motion for a rehearing before Judge Igoe, as the time to file an application for a rehearing expired on March 7, 1944.

Thereafter appellant did not make a formal motion to the Missouri District Court for authorization to continue to prosecute the claim herein because he had concluded, after a further examination of the law, that there was no necessity for obtaining such express authorization. While it always had been appellant's position that this was the law, appellant felt strengthened in the position that he had taken upon reading *Thompson* v. *Terminal Shares*, 104 F. (2d) 1, construing subsection (a) of Section 77, and other cases construing similar language of Section 77B of the Bankruptcy Act (see appellant's main brief, p. 12 et seq.). These cases show that there was little or no enlargement of the jurisdiction of the reorganization court by reason of the language of the statute relied on by the Special Master and the Court below, and certainly no such enlargement of jurisdiction or such change in any other respect as to preclude this claimant from continuing to prosecute the claim herein. These cases had not been called to the attention of the Special Master and the Court, and were not known to appellant at the time he submitted his application for an order to show cause to the St. Louis Southwestern reorganization court.

The appellees apparently have not been eager to have a trial upon the merits of the cause of action set forth in the claim filed herein.

The claim was filed by appellant on April 26, 1934 (Tr. 2). On May 25, 1935, objections were filed by the appellees (Tr. 7). On January 16, 1936, the appellees, by additional objections, raised the point that the effect of the appointment of a trustee of St. Louis Southwestern was to vest in such trustee all causes of action belonging to the St. Louis Southwestern, and that by reason thereof appellant could no longer maintain or assert his claim in the Rock Island reorganization proceedings (Tr. 8).

On June 5, 1941, *over five years thereafter*, appellant received a notice setting the claim down for a hearing on the merits on June 23, 1941.

Shortly thereafter it was proposed that the preliminary question of appellant's right to prosecute the claim should be passed upon by the Special Master. This has been the occasion of additional delay.

During the year 1944 and for the first few months of this year, appellant has been under the heavy burden of preparing his designations of the voluminous record and his briefs on the appeal to the Circuit Court of Appeals in the St. Louis Southwestern reorganization proceedings.

On January 29, 1945, it was stipulated by the appellees to extend the time of this appellant to file his brief on appeal herein from February 15 to April 16, 1945. However, on February 8, 1945, some ten days thereafter, appellees filed their motions to dismiss the appeal and for leave to supplement the record. On February 15, 1945, this Court dismissed the motion to dismiss the appeal but without prejudice to renew said motion at the hearing upon the appeal.

There is an inconsistency in extending for a period of over two months the time to file a brief and within ten days after granting such extension moving to dismiss the appeal.

Facts outside the record are ordinarily not referred to on an appeal. There are a number of facts, however, to which the appellees, in carrying out their purpose "to acquaint this Court with all the facts" (see their motions, p. 6), have not called the attention of this Court.

The question of whether the claim herein is meritorious was not before the Special Master. The sole question presented to him was whether this appellant had the right to continue to prosecute the claim (Tr. 34, 50). Appellees have nevertheless endeavored to show by every means that the claim is without merit.

In support of his claim appellant in his reply to the objections of the appellees, referred to the dissenting opinion of the Chairman of the Interstate Commerce Commission in the St. Louis Southwestern reorganization proceedings (Tr. 12, 15-33); to the proposed report of C. V. Burnside, Assistant Director of the Bureau of Finance of the Commission, on the application of Rock Island to acquire stock control of St. Louis Southwestern, and to the fact that appellant had a very considerable amount of documentary and statistical evidence in his possession bearing on the merits of the claim (Tr. 13).

Appellant sets forth the following additional facts:

1. In connection with his appeal from the decision of the District Court approving a plan of reorganization of the St. Louis Southwestern, appellant alleges that the claim of Southern Pacific Company, a creditor in the amount of over $23,000,000 and owner of 87% of the stock of St. Louis Southwestern, for the reason, among others, that Southern Pacific, in control of St. Louis Southwestern,

failed to enforce causes of action which St. Louis Southwestern had against *Chicago, Rock Island & Pacific*, Kansas City Southern and others, in a plan of reorganization of St. Louis Southwestern should be subordinated to the interest of all other security holders and creditors of St. Louis Southwestern.

2. On or about February 15, 1945, the United States filed a brief *amicus curiae* with the Circuit Court of Appeals in the St. Louis Southwestern appeal, contending that St. Louis Southwestern had a cause of action against the Kansas City Southern which Southern Pacific in control of St. Louis Southwestern should have permitted that company to assert; that Southern Pacific's failure to permit St. Louis Southwestern to do so was a breach of trust for which its claim as a stockholder and creditor should be subordinated in the plan of reorganization of St. Louis Southwestern. The Government in its brief expressly took issue with the Interstate Commerce Commission and the trustee of St. Louis Southwestern in their conclusion that St. Louis Southwestern "had no cause of action against the Kansas City Southern." If the position taken by the Commission is to be considered by this Court, the position taken by the Department of Justice is entitled to at least equal weight.

3. On August 23, 1944, the United States, charging a conspiracy under Sections 1 and 2 of the Sherman Anti-trust Act, instituted suit in the District Court of the United States for the District of Nebraska, Lincoln Division, against numerous railroads owning lines west of the Mississippi, J. P. Morgan & Company, Incorporated, Kuhn, Loeb & Company and others. Among the railroads or their respective trustees joined as defendants in the suit are the trustees of Chicago, Rock Island and Pacific Railway Company, the trustee of St. Louis Southwestern Railway Company, the Kansas City Southern Railway Com-

pany, and Southern Pacific Company. Particulars of the illegal conspiracy and agreement in violation of the Sherman Antitrust Act are set forth in the complaint, twenty separate and distinct violations being charged.

Appellant in his proof of claim filed in these proceedings charges a continuing conspiracy, far-reaching in scope and protracted in time, in violation of the antitrust laws, by which St. Louis Southwestern was controlled to its damage, and finally wrecked. The Government in its complaint charges a continuing conspiracy, even more far-reaching and protracted, in violation of the antitrust laws.

The facts revealed by the allegations of the said complaint and the exhibit annexed thereto not only support appellant's charges but show increased opportunities for mischief to St. Louis Southwestern for a period of many years preceding the filing of the claim herein. Appellant regarded the said facts as constituting newly discovered evidence of the utmost importance and relevancy to his charges of conspiracy by which St. Louis Southwestern was controlled, its assets wasted and its earnings impaired. He therefore moved before the Circuit Court of Appeals that the St. Louis Southwestern proceedings be remanded to the District Court with instructions to remand to the Interstate Commerce Commission in order that the Commission might decide whether to institute an investigation into the facts alleged by the Government in its said suit.

Said motion and the appeal were argued on April 6th and 7th and are now being considered by the Circuit Court.

The claim herein includes not only the cause of action arising out of the participation by Rock Island in the conspiracy by which the earnings of St. Louis Southwestern were impaired during the period of control by Kansas City Southern and Southern Pacific. It also includes a cause of action for the control exercised by Rock Island over

St. Louis Southwestern for the period from March 11, 1925, to October 15, 1925, as a result of which the earnings of St. Louis Southwestern were impaired to the extent of $1,341,928 (Tr. 5). That Rock Island exercised control over St. Louis Southwestern during said period will not be disputed.

In said claim it is asked, in addition, that Rock Island account for its profits in the amount of $2,467,000 arising out of its sale to Kansas City Southern of its dominant stock interest in St. Louis Southwestern. The said sale is alleged to have been in breach of the fiduciary relationship Rock Island was in to St. Louis Southwestern and in violation of the antitrust laws (Tr. 6). A seller of a controlling stock interest in a corporation is under a duty not to transfer control to outsiders if circumstances surrounding the proposed transfer are of a suspicious nature. (See *Insuranshares Corporation* v. *Northern Fiscal Corp.*, 35 F. Supp. 22.)

Appellant asks that the motion to dismiss the appeal be denied.

Appellant also asks that the motion for leave to supplement the record be denied. If, however, the Court decides to grant said motion, appellant asks that this answer be included in the record.

Dated: May 3, 1945.

Respectfully submitted,

WALTER E. MEYER,
Appellant Pro Se,
31 Nassau Street,
New York 5, N. Y.

SONNENSCHEIN, BERKSON, LAUTMANN,
LEVINSON & MORSE,
Attorneys for Appellant,
77 West Washington Street,
Chicago 2, Illinois.